New Hampshire Oil Fund Disbursement Board v. Exxon Mobil Corporation

SETTLEMENT AGREEMENT

This settlement agreement ("Settlement Agreement") is made by and between the New Hampshire Oil Fund Disbursement Board ("Board") and Exxon Mobil Corporation and its respective directors, officers, employees, servants, agents, corporate parents, subsidiaries, affiliated entities, partners, agents, insurers, sureties, successors-in-interest, receivers, executors, administrators, beneficiaries and assigns ("ExxonMobil") (hereinafter collectively referred to as the "Parties"), by and through their counsel, with the intent of binding the Parties to the terms herein.

WHEREAS, on July 16, 2004, ExxonMobil notified the New Hampshire Department of Environmental Services of the completion of a series of settlements as a result of insurance coverage litigation with historic Comprehensive General Liability ("CGL") carriers of Exxon Corporation and Mobil Corporation, predecessors of the entity now known as ExxonMobil. See Attachment 1. The Exxon service station settlements related to a part of claims collectively known as the "North American Coverage Case" or "NACC" and the Mobil service station settlements related to a part of claims collectively known as the Mobil Insurance Recovery Case or "MIRC;" and

WHEREAS, although the NACC settlements involved refineries and other types of facilities and CGL policies for years before 1986, the NACC settlement resolved all claims, past or future, under those policies in exchange for the carriers'

payment of two hundred sixty-nine million dollars ($269,000,000) for past and future Exxon environmental liabilities; and

WHEREAS, a portion of ExxonMobil's NACC settlements involved service stations in New Hampshire for which Exxon had received reimbursements from petroleum reimbursement funds established under RSA 146-D and administered by the Board for response actions with respect to leaking underground storage tank ("UST") systems; and

WHEREAS, petroleum fund reimbursements under RSA 146-D are deemed to be excess insurance and are required to be repaid if compensation is received from other parties; and

WHEREAS, a dispute has arisen between ExxonMobil and the Board as to whether the Board is entitled to repayment of all or a portion of petroleum fund reimbursements with regard to reimbursement claims submitted for cleanup costs associated with Exxon service stations in New Hampshire that were, or could have been, included in the NACC settlement; and

WHEREAS, the Board has calculated a net petroleum funds reimbursement figure of two million nine hundred eighty-seven thousand three hundred fifty-nine dollars ($2,987,359) based only upon certain Exxon service stations identified in the NACC claims and has made a formal demand for repayment of such sum (see Attachment 2) but ExxonMobil disputed this claim and took the position that the Board's mathematical share was eight hundred twenty-one thousand six hundred twenty-seven dollars ($821,627); and

WHEREAS, ExxonMobil sold some of its stations and the Board allowed the purchaser to take credit for ExxonMobil's full or partial satisfaction of the Fund deductible but the Board contended that this credit would be improper and could result in claims against the purchasers; and

WHEREAS, the Parties mediated the Board's claims on January 11, 2007 and reached a settlement in principle, conditioned upon client approval and execution of written agreement; and

WHEREAS, both the Board and ExxonMobil have approved the settlement in principle; and

WHEREAS, the Parties wish to effect final resolution of their dispute by way of this written agreement in order to avoid protracted litigation over their respective positions on underlying facts and points of law.

NOW THEREFORE, in consideration of the following covenants and agreements, the Parties agree as follows:

1. ExxonMobil agrees to pay to the Board the amount of two million forty-one thousand four hundred and thirty-eight dollars ($2,041,438) in exchange for a release of claims that have or could have been asserted by the Board for reimbursement of past Fund payments, penalties, interest or satisfaction of deductibles against ExxonMobil with regard to that portion of the NACC settlement paid for past and future Exxon environmental liabilities. The payment will be made by lump sum in the form of a check made out to "Treasurer, State of New Hampshire" and forwarded via overnight mail within thirty (30) days of the effective

date of this Settlement Agreement to the New Hampshire Attorney General's Office, 33 Capitol Street, Concord, NH 03301, ATTN: Maureen D. Smith. Late payment shall be subject to the statutory interest rate of 10% per annum (NHRSA 336:1, I (Supp. 2006)). The amount of thirteen thousand nine hundred sixty-nine dollars ($13,969) shall be allocated to the Attorney General's Office to be used for public protection purposes to be determined at the discretion of the Attorney General. The remaining sum of two million twenty-seven thousand four hundred sixty-nine dollars ($2,027,469) shall be allocated to petroleum reimbursement funds under RSA 146-D, E and F, as deemed appropriate by the Board.

2. In exchange for such payment, the Board releases ExxonMobil from any claims for repayment of petroleum fund reimbursements relating solely to that portion of the NACC settlement paid to Exxon for past and future environmental liabilities, as well as from any claims against ExxonMobil or purchasers of ExxonMobil's New Hampshire service stations for repayment of RSA 146-D deductibles that have been satisfied to date, subject to the limitations set forth in paragraphs 3 and 4 herein.

3. The release set forth in paragraph 2 shall be not construed to prevent the Board from conducting an audit with respect to any petroleum funds reimbursement claims submitted by ExxonMobil or its predecessor and successor entities, or from seeking repayment of amounts erroneously paid to ExxonMobil or its predecessor and successor entities as a result of technical errors in the claim or resulting reimbursement.

4. The release set forth in paragraph 2 shall not extend to any Board claims that might exist against Mobil Corporation as a predecessor entity that obtained recovery for Mobil service stations under the NACC or MIRC settlements, nor should the release be construed to limit any Board or State of New Hampshire claims, rights or authorities, including enforcement authorities, unrelated to payments made to or deductibles fully or partially satisfied by Exxon Corporation as a result of NACC settlement. The State of New Hampshire and the Board expressly reserve the right to institute any new action or to proceed with any pending administrative, civil or criminal action against ExxonMobil or its predecessor and successor entities, except with regard to actions for recovery of petroleum fund reimbursements made to or deductibles fully or partially satisfied by ExxonMobil as a result of NACC settlement payments to Exxon Corporation. The State of New Hampshire further expressly reserves all past, current and future claims against ExxonMobil with respect to MtBE contamination of the waters and groundwaters of the State, including, without limitation, all claims related to, encompassed by or arising out of the action titled *State of New Hampshire v. Amerada Hess Corp, et al.*, MDL 1358 (SAS) (D.N.Y.). Nothing in this agreement shall establish any basis for setoff by ExxonMobil or any of its predecessor or successor entities against any recovery by the State of New Hampshire in such action, whether through settlement or court judgment. Moreover, nothing in this agreement shall affect any liability that ExxonMobil otherwise has with respect to federal, state or local law unrelated to

repayment of petroleum funds to the Board as a result of NACC settlement payments to or deductibles fully or partially satisfied by Exxon Corporation.

5. The Board agrees to process all pending and future ExxonMobil claims for petroleum funds reimbursement in the normal course, subject to all statutory and regulatory requirements applicable to petroleum funds administered by the Board under RSA 146-D, E and F.

6. The Parties agree that neither party is permitted to reopen the matter or matters which are the subject of this Settlement Agreement except by reason of (1) fraud; (2) misrepresentation of a material fact; or (3) mutual mistake of a material fact sufficient to cause a contract to be reformed or set aside.

7. The Parties hereby covenant, promise and agree that this Settlement Agreement shall be binding on both Parties, including all of the Parties' members, officers, shareholders, directors, employees, predecessors, successors in interest, subsidiaries, agents, attorneys, servants, assigns, and all companies and corporations in which ExxonMobil has an interest and which may file claims before the Board.

8. This Settlement Agreement constitutes the entire agreement between the Parties and is deemed to be in full force and effect upon the date executed by both Parties.

9. The Parties to this Settlement Agreement agree that New Hampshire law shall govern any dispute arising hereunder and that, in the event that the Parties cannot resolve any dispute arising hereunder, the State of New Hampshire Merrimack Superior Court shall have jurisdiction to hear any claims made hereunder.

10. The undersigned warrant and represent that they are of legal age and are legally competent and fully authorized to enter into and execute this Settlement Agreement on behalf of the Parties.

11. Nothing in this Settlement Agreement or the proceedings leading up to this Settlement Agreement shall be construed as an admission against either of the Parties nor shall the payment resolving these disputed claims be construed as an admission against either Party.

NEW HAMPSHIRE OIL FUND DISBURSEMENT BOARD

By Its Attorneys
Kelly A. Ayotte
New Hampshire Attorney General

Maureen D. Smith
Senior Assistant Attorney General
K. Allen Brooks
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301

Date: 4-30-07

EXXONMOBIL CORPORATION

By Its Attorney

Robert B. Wallis
Government Litigation Coordinator – Environmental
Exxon Mobil Corporation
800 Bell Street
Houston, TX 77002

Date: 4/27/07

ExxonMobil
Refining & Supply Company
3225 Gallows Road
Fairfax, Virginia 22037-0001

ExxonMobil
Refining & Supply

New Hampshire Department of Environmental Services
Petroleum Reimbursement Fund Program
Joyce Bledsoe
Fund Manager
29 Hazen Drive
Concord, New Hampshire 03302

July 16, 2004

Re: *ExxonMobil insurance claims for historic environmental losses*

Dear Ms. Bledsoe:

I am writing to inform you that a number of state Underground Storage Tank (UST) funds have requested information from ExxonMobil regarding our claims for historic environmental losses against various insurers. We are responding to their request in writing and with this letter would like to share relevant information with you.

Neither Exxon nor Mobil historically carried insurance covering environmental losses for individual service stations. Exxon and Mobil had established "financial responsibility" under UST programs by qualifying as "self-insured" and satisfied fund deductible requirements through self-payment. As a result, insurance-related inquiries in UST reimbursement forms were generally answered in the negative.

Exxon, and later Mobil, filed claims with insurers of their Comprehensive General Liability (CGL) policies with the aim of recovering, in part, environmental remediation expenditures for underground storage tank "occurrences". These "occurrence" policies generally covered years that pre-existed the years in which state UST funds reimbursed remediation expenditures. The insurers denied these claims and ExxonMobil filed suits.

ExxonMobil began attaching a brief description of these suits to UST claim forms once it appeared that some of the insurers would settle in the above-referenced litigation, although they continued to deny liability. Last year, the last of the insurer defendants settled, resulting in partial payment of ExxonMobil's claim but no judicial resolution of the insurers' liability.

Accordingly, until further notice, ExxonMobil will attach a brief description of the outcome of the litigation to specific claim forms. The following paragraphs provide a summary of the litigation and are intended to amend and/or supplement Exxon's, Mobil's and ExxonMobil's previous responses to questions about insurance, subrogation or reimbursement from other sources which are contained in the required paperwork.

Should you have any questions or desire other information, please contact Robert Wallis at 713-656-5961 or by electronic mail at robert.b.wallis@exxonmobil.com.

Summary of Exxon and Mobil reimbursement litigation for remediation costs

From the 1950s to the 1980s over 300 insurance companies issued general liability insurance policies to Exxon and Mobil. Exxon and Mobil have sought to hold these companies responsible for paying for the investigation and remediation of environmental contamination at several thousand sites. These sites included refineries, chemical plants, terminals, bulk storage facilities, waste disposal sites and service stations.

The insurance coverage claims related to environmental investigation and cleanup costs incurred by or imposed on a large number of Exxon and Mobil affiliates in the United States and Canada. This involved hundreds of separate insurance policies.

During the period 1999-2003 and following extensive insurance coverage litigation in three courts, ExxonMobil entered into over 100 individual compromise settlement agreements with Exxon's and Mobil's pre-merger (1999) insurers. This resolved Exxon's and Mobil's claims to insurance coverage for past and future environmental investigation and cleanup costs.

Throughout the years of litigation and settlement negotiations, the insurers denied coverage altogether, raising numerous coverage defenses as complete bars to coverage. Some of the insurers' defenses included:

(1) each site constitutes a separate "occurrence" for the purpose of applying a large self-insured retention or deductible amount separately applicable to each "occurrence";
(2) no coverage in absence of a judgment in a court of law or pursuant to the order of a governmental agency imposing liability for investigation and remediation costs inasmuch as the policies covered only sums Exxon and Mobil become legally liable to pay "as damages" (especially if California law applied, where the Exxon suit was venued);
(3) no coverage for sums incurred voluntarily or without the insurers' prior written consent;
(4) an exclusion applicable to damage to property owned by or in the care, custody or control of the insured;
(5) no coverage for contamination that was "expected or intended" from the standpoint of the insured;
(6) no coverage unless the insured could prove that the contamination was "caused by accident";
(7) no coverage because the insurers did not receive timely notice of the "occurrence" or of the loss (especially if New York law applied, and New York was the corporate headquarters of Exxon and Mobil for much of the period);
(8) no coverage for environmental expenditures after 1985 because of the "absolute pollution exclusion" language in policies for years 1986 and after.

Exxon's gross claim for environmental costs for U.S. and Canadian divisions' and affiliates' past expenditures was 1.26 billion dollars through December 31, 1998 for occurrences (as defined in policies) prior to 1986. The claims that were attributed to the 3687 service stations included in the litigation accounted for 691 million dollars of the alleged expenditures in the gross claim after a deduction of 86 million dollars to account for state LUST fund reimbursements. The gross claim was for policy years ending in 1985.

Through a series of settlements from 1999-2001, ExxonMobil recovered 269 million dollars for past and future heritage Exxon environmental liabilities. Net recovery was 200 million after deducting external and internal litigation costs of prosecuting the coverage action against the insurers. This covered all claims including, for example, refineries. The amount attributable to LUST fund recoveries for individual service stations in New Hampshire depends on the date of "occurrence" at a particular site and could be zero.

Mobil's gross claim against the heritage Mobil insurers for world-wide past remedial expenditures was 1.33 billion dollars through May 3, 2000 for occurrences (as defined in policies) prior to January 1, 1989. This includes claims against the insurers of heritage Superior Oil and General Petroleum sites, which totaled 18 million dollars and 54 million dollars respectively. Thirty-one (31) service stations accounted for 54 million dollars of the expenditures alleged in the gross claim.

Through a series of settlements from 2000-2003, ExxonMobil recovered 153 million dollars for heritage Mobil environmental liabilities, past and future. Net recovery was 142 million after deducting external and internal expenses of prosecuting the coverage action against the insurers. This covered all claims including, for example, refineries. The amount attributable to LUST fund recoveries for individual service stations in New Hampshire depends on the date of "occurrence" at a particular site and could be zero.

Sincerely,

Yvette M. Williams

Yvette Williams, Reimbursement Coordinator
ExxonMobil Global Services

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL

ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

August 31, 2006

Yvette Williams, Reimbursement Coordinator
ExxonMobil Global Services
ExxonMobil Refining & Supply Company
3225 Gallows Road
Fairfax, Virginia 22037-0001

Re: ExxonMobil Insurance Claims for Historic Environmental Losses

Dear Ms. Williams:

This follows your July 16, 2004 correspondence to the New Hampshire Department of Environmental Services disclosing settlements with private insurers for cleanup costs associated with certain oil-contaminated sites in New Hampshire. Prior to the disclosure, ExxonMobil had requested and received reimbursement for cleanup costs with regard to those sites from New Hampshire's Oil Discharge and Disposal Cleanup Fund, RSA 146-D.

The Oil Fund Disbursement Board, which administers the Petroleum Reimbursement Funds, through its counsel, the Attorney General's Office, has communicated with ExxonMobil's counsel, Robert B. Wallis, Esq., to discuss resolution of the Board's claims for repayment of the Fund reimbursements in light of the insurance settlements. The Board's position is that the RSA 146-D funds provide excess insurance only, that the Board was not informed of the ExxonMobil coverage litigation nor was it provided an opportunity to participate in the settlement, that deduction of fund monies paid in calculating ExxonMobil's private insurance claims was inappropriate and that the Board's statute and rules require repayment of any funds paid to ExxonMobil for cleanup of sites included in the insurance settlement. As documented in materials provided to Attorney Wallis, the amount reimbursed to ExxonMobil for the subject sites totals two million nine hundred eighty seven thousand three hundred fifty nine dollars ($2,987,359.00).

Because there has been little progress in resolving the Board's claims, on August 21, 2006, the Board asked this office to issue a formal demand for repayment

of all reimbursement funds paid to ExxonMobil with regard to the New Hampshire sites included in the insurance coverage litigation. In addition, the Board determined that the underlying facts concerning the insurance coverage litigation and subsequent settlements entered by ExxonMobil or its predecessors and successors, which were not disclosed to the Board until after statutory reimbursement claims were submitted and paid, constitute "material facts" under the Board's reimbursement statute and rules.

Please deem this as a formal demand on behalf of the Board for immediate repayment of $2,987,359.00 to the Petroleum Reimbursement Funds. If you are not able to obtain the necessary documentation from Attorney Wallis, I would be glad to provide you with the information necessary to facilitate your processing this claim.

Depending upon the nature of your response, there might also be additional claims asserted against ExxonMobil or subsequent purchasers of the affected sites for improper crediting of initial cleanup costs (statutory deductibles) under RSA 146-D, as well as other claims not raised to date.

The repayment should be made within 30 days to avoid further legal action by the Board, through the Attorney General's Office. Payment should be made by certified check to "Treasurer, State of New Hampshire" and should be sent by first class mail, postage prepaid, to my attention at the Attorney General's Office.

Thank you for your prompt attention to this matter.

Very truly yours,

Maureen D. Smith

Maureen D. Smith
Senior Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

cc: Kevin Sheppard, Chairman, Oil Fund Disbursement Board
Robert B. Wallis, Esq., Government Litigation Coordinator, ExxonMobil Corp.
George Lombardo, Oil Remediation & Compliance Bureau, NHDES
Timothy Denison, Oil Remediation & Compliance Bureau, NHDES